

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 26, 2001

IN RE:)	
)	DOCKET NO. 01-00513
PETITION OF MCI WORLDCOM TO ENFORCE)	
INTERCONNECTION AGREEMENT WITH)	
BELLSOUTH TELECOMMUNICATIONS, INC.)	

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT AND REVISING
PROCEDURAL SCHEDULE**

Background

This matter came before the Tennessee Regulatory Authority (the "Authority" or "TRA") upon the Motion for Summary Judgment (the "Motion") in this matter filed by MCI WorldCom, Inc. ("MCI") on August 27, 2001. On June 12, 2001, MCI filed a petition to enforce an interconnection agreement ("the Petition") with BellSouth Telecommunications, Inc. ("BellSouth"). BellSouth filed an answer to the Petition ("the Answer") on July 18, 2001. At a regularly scheduled Authority Conference held on August 21, 2001, a majority of the Authority's Directors voted to appoint the Authority's General Counsel or his designee as hearing officer to render a decision on the merits.

MCI filed its Motion on August 27, 2001. BellSouth filed a memorandum in response to the Motion (the "Response") on September 10, 2001. MCI filed a reply in support of the Motion (the "Reply") on September 11, 2001.

Pursuant to a Notice issued on September 13, 2001, a Pre-Hearing Conference was held before Jonathan N. Wike, Hearing Officer, on September 19, 2001. In attendance at the Pre-Hearing Conference were the following parties:

MCI WorldCom, Inc. – **Henry Walker, Esq.**, Boulton, Cummings, Connors & Berry, PLC, 414 Union St., Suite 1600, Nashville, Tennessee 37219;

BellSouth Telecommunications, Inc. – **Joelle Phillips, Esq.** and **Guy Hicks, Esq.**, 333 Commerce Street, Suite 2101, Nashville, Tennessee 37201;

During the Pre-Hearing Conference, counsel for the parties presented oral argument on MCI's Motion.

In its Petition, MCI requests that the TRA enforce the provisions of an interconnection agreement (the "Brooks Fiber" or "Opt-In Agreement") between Brooks Fiber of Tennessee, Inc. ("Brooks Fiber"), an affiliate of MCI, and BellSouth. As explained in the Petition, the Brooks Fiber Agreement was entered into on June 16, 1999. The parties filed for Authority approval of this Agreement on August 11, 1999, and the Agreement was approved by the Authority on December 7, 1999.¹ The Petition states that in the Brooks Fiber Agreement, MCI "opted to accept the terms, condition and attachments" of a pre-existing interconnection agreement (the "MCImetro Agreement") between MCImetro Access Transmission Services, Inc. and BellSouth.² The MCImetro Agreement was entered into on April 4, 1997 and was approved by the Authority on May 6, 1997. The Petition further states that the "agreement requires each party to compensate the other for the termination of local exchange traffic, yet in spite of that language, BellSouth has refused to pay MCI WorldCom for handling calls made to ISPs."³

¹ See *Order Approving Interconnection Agreement*, Docket No. 99-00583 (August 21, 2000). A copy of the Brooks Fiber Agreement and a copy of the MCImetro Agreement are attached to MCI's Petition.

² Petition, p. 1.

³ *Id.*, p. 2. ISPs are internet service providers.

MCI quotes the following provision in the MCImetro Agreement in support of its contention that BellSouth is obligated under the Brooks Fiber Agreement to pay reciprocal compensation for ISP-bound traffic:

2.2.1 The Parties shall bill each other reciprocal compensation at the rates set forth for Local Interconnection in the Agreement and the Order of the TRA. Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area (EAS) exchange. The terms Exchange and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.⁴

MCI relies upon two prior TRA rulings on the issue of reciprocal compensation for ISP-bound traffic: *Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, Docket No. 98-00118 ("*Brooks Fiber*"), and *Complaint of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. against BellSouth Telecommunications, Inc. to Enforce Reciprocal Compensation and "Most Favored Nation" Provisions of the Parties' Interconnection Agreement*, Docket No. 98-00530 ("*Hyperion*").⁵ MCI states that the definition of "local traffic" contained in the MCI WorldCom Agreement is identical to the definition contained in the interconnection agreement at issue in *Hyperion*. MCI further states:

There does not appear to be any relevant distinction between the Brooks Fiber or Hyperion contract provisions on reciprocal compensation and the corresponding provision in the agreement adopted by MCI WorldCom. Therefore, the agency's decisions in Brooks Fiber and Hyperion require that similar relief now be granted to MCI WorldCom.⁶

⁴ *Id.*, p. 3.

⁵ See *Initial Order of Hearing Officer, In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and For Emergency Relief* (the "*Brooks Fiber Order*"), Docket No. 98-00118 (April 12, 1998) p. 12; *Initial Order of Hearing Officer on the Merits, Complaint of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. Against BellSouth Telecommunications, Inc. to Enforce Reciprocal Compensation and "Most Favored Nations" Provisions of the Parties' Interconnection Agreement* (the "*Hyperion Order*"), Docket No. 98-00530 (March 14, 2000) p. 8. See also *Order Affirming the Initial Order of the Hearing Officer*, Docket No. 98-00118 (August 17, 1998) (affirming *Brooks Fiber Order*); *Order Denying BellSouth's Petition for Appeal and Affirming the Initial Order of the Hearing Officer*, Docket No. 98-00530 (September 22, 2000) (affirming *Hyperion Order*).

⁶ *Petition*, p. 3.

In its Motion, MCI additionally relies upon the Authority's recent decision in a third case involving the issue of reciprocal compensation for ISP-bound traffic, *Petition of MCI WorldCom, Inc. to Enforce Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 99-00662 ("MCImetro"). An Initial Order in *MCImetro* was issued on June 15, 2001,⁷ and this Initial Order became the final order of the Authority on June 30, 2001. MCI notes that in *MCImetro*, the Authority interpreted the reciprocal compensation provisions of the MCImetro Agreement and "ruled that the term 'local traffic' as used in that agreement includes calls to Internet Service Provider ('ISPs') and, therefore, that the MCImetro Agreement 'requires the payment of reciprocal compensation for ISP bound traffic.'"⁸

MCI sets forth the basis for its Motion for Summary Judgment as follows:

Under the "opt-in" provision of the federal Telecommunications Act, Brooks Fiber is entitled to interconnect with BellSouth under the same terms and conditions as provided in the MCImetro Agreement. See 47 U.S.C. § 252(i). As the TRA itself explained, a competing carrier "has an unfettered right to obtain the most generous terms and conditions made available by BellSouth" to any other carrier. *In the [sic] Complaint of AVR of Tennessee, LP d/b/a Hyperion of Tennessee, et seq.*, Docket 98-00530 (September 2, 2000) Initial Order, at 30.⁹

As set forth in the Opt-In Agreement, Brooks Fiber exercised that right by adopting the MCImetro Agreement, a choice which was agreed to by BellSouth and approved by the TRA. Therefore, Brooks Fiber is entitled, as a matter of law, to reciprocal compensation under the same terms and conditions as provided in the MCImetro Agreement. As the TRA has ruled, those terms and conditions include the right to collect compensation for terminating calls to ISPs.¹⁰

In its Response, BellSouth states that "[t]o date, no evidentiary record has yet been compiled in this case on which summary disposition could be granted."¹¹ BellSouth states that

⁷ *Initial Order of Hearing Officer on the Merits* (the "MCImetro Order"), Docket No. 99-00662 (June 15, 2001).

⁸ Motion, pp. 1-2, quoting *MCImetro Order*, p. 27.

⁹ The *Hyperion Order* was issued on March 14, 2000. The quotation is from page 31 of that Order.

¹⁰ Motion, p. 3.

¹¹ Response, p. 1.

“[w]hen evidence is submitted in this case, the evidence will demonstrate differences between this case and the *MCImetro* case, which differences preclude disposition based on the *MCImetro* ruling.”¹² BellSouth identifies three (3) specific areas of difference between *MCImetro* and the present case:

(1) the differences between the contracts themselves in light of the second (opt-in) agreement between these parties; (2) the distinct circumstances surrounding the opt-in by Brooks Fiber and the intent of the parties as demonstrated by these distinctions; as well as (3) the lack of any evidence in this case regarding the tandem or end-office switching being performed by Brooks Fiber.¹³

BellSouth does not dispute the identity in the language of the reciprocal compensation provisions of the *MCImetro* Agreement as originally approved by the Authority in 1997 and the provisions of the same Agreement as adopted in the Brooks Fiber Agreement in 1999. BellSouth attempts to distinguish the circumstances surrounding the *MCImetro* Agreement from those surrounding the Brooks Fiber Agreement, and thus *MCImetro* from the present case. BellSouth states that the Authority based its decision in *MCImetro* on evidence of the intent of the parties regarding reciprocal compensation at the time of the *MCImetro* Agreement. BellSouth argues that in the present case, as in *MCImetro*, the Authority should consider evidence regarding the intent of the parties at the time the reciprocal compensation provisions were entered into. The relevant time, however, in BellSouth’s view, is not the time of the *MCImetro* Agreement but rather the time of the Brooks Fiber Agreement. BellSouth states:

In this case, the “situation of the parties,” as BellSouth will demonstrate through pre-filed testimony, was this: BellSouth had made its position clear regarding ISP-bound traffic and the parties had no reason to specifically reference it in the provision defining local traffic. Unlike the

¹² *Id.*, p. 2.

¹³ *Id.* Notwithstanding its statements that an evidentiary record needs to be established in the present case, BellSouth states that it is “willing to waive cross-examination, dispense with a live hearing, and submit the case to the Hearing Officer based on the pre-filed testimony and briefs.” *Id.*, p. 1, n.1.

MCImetro case, these parties entered into the agreement at a later time, a time when Brooks Fiber must have known of BellSouth's intent.¹⁴

BellSouth bases its argument on Tennessee state law principles regarding contract interpretation. BellSouth quotes from the decision of the Tennessee Supreme Court in *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 334 (Tenn. 1983):

The court in interpreting words or other facts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation even to an agreement that on its face is free from ambiguity, it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into – not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.¹⁵

In further support of its argument that such evidence should be presented, BellSouth cites the Tennessee state law principle that “laws, in force at the time of the making of a contract, enter into and form a part of the contract as if they were expressly incorporated into it.”¹⁶ BellSouth refers here to the Federal Communication Commission's (“FCC”) ruling on reciprocal compensation for ISP-bound traffic (the “Declaratory Ruling”), which the FCC issued on February 26, 1999.¹⁷ BellSouth states:

At the time that MCI and BellSouth entered into the Brooks Fiber Agreement on June 16, 1999, the FCC's February 26, 1999 Declaratory Ruling was in effect and was the governing authority for the treatment of ISP-bound traffic. . . . In the Declaratory Ruling, the FCC held that ISP-bound traffic was not subject to reciprocal compensation because it was largely interstate.¹⁸

BellSouth further states:

“Local Traffic” is defined in the second MCI agreement as “any telephone call that originates and terminates in the same LATA”

¹⁴ *Id.*, pp. 6-7.

¹⁵ Quoted in Response, p. 6.

¹⁶ Response, p. 10, citing *Hannum v. McInturf*, 65 Tenn. 225 (Tenn. 1873).

¹⁷ Implementation of the Local Compensation Provision in the Telecommunication Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689 (1999).

¹⁸ Response, p. 10.

Second MCI agreement, Attachment 11. Therefore, as a matter of law at the time of the execution of the second MCI agreement, the definition of “Local Traffic” could not have included ISP-bound traffic because, according to the Declaratory Ruling, ISP-bound traffic was interstate and thus could not “originate[] and terminate[] in the same LATA.” Under the Tennessee authority outlined above, the then-existing FCC ruling that ISP-bound traffic was interstate, became part of the contract created by the opt-in.¹⁹

BellSouth then states that in the *MCImetro* decision and the Authority’s other decisions on the ISP issue, the Authority “focused on the fact that there was no express intent to exclude ISP-bound traffic from the definition of ‘Local Traffic.’”²⁰ BellSouth concludes:

Thus, under the standard articulated in the decisions cited by MCI, the Authority found that ISP-bound traffic was subject to reciprocal compensation unless the agreement specifically stated otherwise. These rulings were based on the premise that the law at the time treated ISP-bound traffic as local. As of the Declaratory Ruling, however, that was no longer the case.²¹

On this basis, BellSouth argues that “the prior *MCImetro* order and other previous decisions cited by MCI, are not dispositive of this specific case.”²²

Finally, BellSouth discusses the effect of the FCC’s Order on Remand,²³ which the FCC issued in 2001 in response to the decision of the D. C. Circuit Court of Appeals vacating and remanding the Declaratory Ruling. BellSouth states:

The Authority’s analysis must now change in light of the FCC’s Remand Order. Under that Order, the FCC confirmed that ISP-bound traffic is not subject to the reciprocal compensation provisions of Section 251(b)(5) and that it is predominately interstate access traffic under Section 251(g).²⁴

BellSouth further states:

¹⁹ *Id.*, pp. 10-11.

²⁰ *Id.*, p. 11.

²¹ *Id.*

²² *Id.*

²³ Order on Remand and Report and Order, CC Docket No. 96-98 and CC Docket No. 99-68, April 27, 2001.

²⁴ Response, p. 12.

As a result, pursuant to binding authority, the only way parties to an interconnection agreement can now owe each other reciprocal compensation for the transport and termination of ISP-bound traffic is if they explicitly included such a provision in the agreement. Without it, federal law requires that any state commission interpreting an agreement find that reciprocal compensation is not owed for ISP-bound traffic.

Indeed, there is a serious question as to whether the Authority has jurisdiction to order anything other than that reciprocal compensation is not owed for ISP-bound traffic. . . . Simply put, to follow the analysis set forth in the Brooks Fiber, Adelphia [*Hyperion*] and MCI Orders would be contrary to federal law and the FCC's expressed goal to limit the regulatory arbitrage that has resulted from the payment of reciprocal compensation for ISP-bound traffic.²⁵

BellSouth adds:

The FCC's statement that the Remand Order does not "preempt any state commission decisions regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here," does not require a different conclusion. FCC Remand Order at ¶ 82. As made clear by its express terms, the FCC Remand Order does not preempt "any state commission *decisions*." The Authority has yet to issue a decision regarding compensation for ISP-bound traffic for the Second MCI/Brooks Fiber Agreement. Thus, the FCC determination that ISP-bound traffic is not subject to reciprocal compensation applies to the Authority's interpretation of that agreement.²⁶

BellSouth also objects to the Motion on the grounds that insufficient evidence has been submitted regarding the amounts that would be owed should the Authority find that the Brooks Fiber Agreement requires reciprocal compensation for ISP-bound traffic. BellSouth states:

MCI's complaint appears to seek recovery of reciprocal compensation of [sic] the tandem switching rate. There is a genuine issue of fact as to whether MCI provides tandem switching in accordance with Federal Communications Commission ("FCC") Rules, and no evidence has been presented regarding the operation of the Brooks Fiber switches at issue.²⁷

BellSouth also questions whether the tandem switching rates cited by MCI are applicable in this case, arguing that the rates MCI cites "have been superceded [sic] by the cost-based rates

²⁵ *Id.*, pp. 12-13.

²⁶ *Id.*, p. 13.

²⁷ *Id.*, p. 3.

established by the Authority in the UNE Proceeding, Docket No. 97-01262.”²⁸ BellSouth further notes that in *MCImetro*, MCI did not raise billing issues until it filed a motion for sanctions following the Initial Order. BellSouth asserts that “[i]f MCI obtains an order in this docket, without submission of any evidence, it will no doubt pursue the same course of distorting such an order to address issues of rates, calculation of minutes, and determination of jurisdiction of calls just as it has done in the other docket.”²⁹

Summary Judgment

Summary judgment is an appropriate method of resolving issues in administrative proceedings, and the standard for determining whether summary judgment should be granted generally follows the standard applied in the courts.³⁰ The Authority’s Rules specifically provide for resolution of issues through summary judgment. Authority Rule 1220-1-2-.22 states:

General Procedural Powers.

In any contested case the Authority or the Hearing Officer:

- (1) may determine that there is no genuine issue as to any material fact. In reaching such determination, the Authority or Hearing Officer may, in its discretion, hear and determine all or any part of a case, without hearing oral testimony;
- (2) may, on its own motion or the motion of any party, allow amendments, consolidate cases, join parties, sever aspects of the case for separate hearings, permit additional claims or contentions to be asserted, bifurcate or otherwise order the course of proceedings in order to further the just, efficient and economical disposition of cases consistent with the statutory policies governing the Authority; and
- (3) shall afford all parties an opportunity to be heard after reasonable notice before exercising these general procedural powers.

²⁸ *Id.*, p. 8.

²⁹ *Id.*, pp. 9-10.

³⁰ See e.g. *Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996); *Puerto Rico Aqueduct and Sewer Authority v. United States Environmental Protection Agency*, 35 F.3d 600, 605-06 (1st Cir. 1994); *Contini v. Board of Education of Newark*, 668 A.2d 434, 441-42 (N.J. App. 1995); *Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board*, 405 N.E.2d 151, 156-57 (Mass. App. 1980).

Discussion and Findings

This case presents two general issues. The first and more familiar one is the issue of whether the provisions of the MCImetro Agreement, as adopted by the parties in the Brooks Fiber Agreement, require the parties to the Brooks Fiber Agreement to pay reciprocal compensation for ISP-bound traffic. The second issue concerns the amounts due for such traffic under the Brooks Fiber Agreement, should it be found that Agreement requires that such compensation be made.

On the first issue, the Authority's decision is determined by the provisions of the Federal Telecommunications Act of 1996 (the "1996 Act"), which is the framework for interconnection agreements, including the MCImetro Agreement and those at issue in *Brooks Fiber* and *Hyperion*. Section 251 of the 1996 Act imposes upon an incumbent local exchange carrier ("ILEC"), such as BellSouth, the "duty to provide, for the facilities and equipment of any requesting telecommunication carrier, interconnection" with the ILEC's own network.³¹ Section 252 of the 1996 Act establishes procedures for the negotiation or arbitration of agreements governing interconnection between ILECs and other carriers as well as the approval of such agreements by the appropriate state commission.

As part of the process of constructing interconnection agreements, the 1996 Act allows an interconnecting carrier to adopt the provisions of any other interconnection agreement to which the other carrier is a party. Section 252(i) provides that:

A local exchange carrier shall make available any interconnection, service, or network element provided under any agreement to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as there provided in the agreement.³²

³¹ 47 U.S.C. § 251(c)(2).

³² 47 U.S.C. § 252(i).

The FCC regulation interpreting Section 252(i) (the “Pick and Choose Rule”) provides in relevant part that:

An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, **upon the same rates, terms, and conditions as those provided in the agreement.**³³

Although originally struck down by the Eighth Circuit Court of Appeals, the Pick and Choose Rule was upheld by the United States Supreme Court.³⁴ The Supreme Court rejected the Eighth Circuit’s reasoning that allowing interconnection carriers to choose freely from among the provisions of existing agreements would deter the voluntary negotiations favored by the 1996 Act.³⁵

The Brooks Fiber agreement expressly invokes Section 252(i). The opt-in mechanism in the Brooks Fiber Agreement, whereby the parties adopted some, but not all, of the provisions of the MCImetro Agreement, as well as the Authority’s approval of the opt-in, was proper under Section 252(i) and the Pick and Choose Rule.³⁶

As MCI states, the Authority has already determined that the reciprocal compensation provision contained in the MCImetro Agreement requires payment of reciprocal compensation for ISP-bound traffic. As MCI also states, the Brooks Fiber Agreement adopts the reciprocal compensation provision in the MCImetro Agreement.³⁷ Thus, the language contained in the MCImetro Agreement regarding reciprocal compensation governs the payment of reciprocal

³³ 47 C.F.R. § 51.809(a)(1998) (Emphasis provided).

³⁴ See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (rev’d in part by 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999)).

³⁵ See the discussion of the Supreme Court’s decision in *Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812, 817-18 (5th Cir. 2000).

³⁶ The new agreement thus created may be a “hybrid” of provisions selected from prior agreements combined with provisions that are peculiar to the new agreement. See *Waller Creek*, 221 F.3d at 819.

³⁷ The language MCI quotes from the MCImetro Agreement (see Petition, p. 3) is quoted at page 5 of the *MCImetro Order* and is the basis for the Authority’s decision in *MCImetro*. See *MCImetro Order*, p. 5.

compensation under the Brooks Fiber Agreement. On this basis, MCI argues that the Brooks Fiber Agreement obligates the parties to make reciprocal argument payments upon the same terms that the Authority has found to apply in the MCImetro Agreement. The Hearing Officer agrees.

A contrary result would be inconsistent with the provisions of Section 252(i) as interpreted by the FCC and upheld by the Supreme Court. For these provisions to have their full effect, a carrier in MCI's position must be able to receive the benefits of an earlier agreement that the carrier elects to adopt in the manner in which the earlier agreement has been held to apply. Otherwise, BellSouth would not be making available to MCI "the same rates, terms, and conditions as those provided in the agreement."³⁸ Because the MCImetro Agreement has been held to require the payment of reciprocal compensation for ISP-bound traffic, a subsequent agreement that adopts the provisions of the MCImetro Agreement regarding reciprocal compensation must be held to make the same requirement. This being the case, evidence concerning the parties' intent as to the treatment of ISP-bound traffic at the time of the Brooks Fiber Agreement is not relevant, and it is appropriate to decide this issue as a matter of law.

BellSouth correctly notes that the parties' intent as to ISP-bound traffic at the time of the MCImetro Agreement was central to the Hearing Officer's decision in *MCImetro*. In that case, indeed, an examination of the parties' intent was found to be consistent with principles of contract interpretation under Tennessee Law. The examination of the parties' intent in *MCImetro* was undertaken, however, in a manner necessitated and guided by the 1996 Act and, to a large degree, by the FCC's Declaratory Ruling. It did not rely solely upon state law. In the present case, notwithstanding the state law principles BellSouth cites, Section 252(i) of the 1996

³⁸ See 47 C.F.R. § 51.809(a)(1998).

Act dictates that the only permissible determination of the parties' intent relates to the MCImetro Agreement and the time when **that Agreement** was entered into, and that determination has already been made.

Further, because the parties' intent at the time of the Brooks Fiber Agreement is irrelevant, BellSouth's reliance on the purported change in the law effected by the FCC's Declaratory Ruling is misplaced. Although the strength of the Declaratory Ruling as "the governing authority for the treatment of ISP-bound traffic" is questionable,³⁹ BellSouth's argument must fail because it forces a result that is inconsistent with Section 251(i) and the Pick and Choose Rule.

Further, BellSouth misreads the Order on Remand. The Order on Remand establishes a new regime governing the treatment of ISP-bound traffic for purposes of reciprocal compensation. Contrary to BellSouth's reading, the Order on Remand establishes this new regime **prospectively**.⁴⁰ By its own terms, the Order on Remand does not deprive a state commission of the authority, affirmed in the Declaratory Ruling, to hold that an interconnection

³⁹ Aside from the obstacle created by the pre-emptive effect of Section 252(i), BellSouth's argument forces one to conclude that during the brief period when it was in effect, the Declaratory Ruling specifically prohibited the payment of reciprocal compensation for ISP-bound traffic. As the *MCImetro Order* explained, the Declaratory Ruling, by its own terms, does not have that effect. In the Declaratory Ruling, the FCC states that the state commissions may determine that parties to an interconnection agreement agreed that reciprocal compensation should include ISP-bound traffic. The FCC also candidly listed several reasons why parties to an interconnection agreement could have concluded, at least prior to the Declaratory Ruling, that ISP-bound traffic should be treated as local, including prior actions by the FCC itself. See *MCImetro Order*, pp. 15-22.

BellSouth correctly states that the Authority has focused in prior decisions on BellSouth's failure to exempt ISP-bound traffic in express terms. BellSouth argues that in 1999, while the Declaratory Ruling was in effect, the burden was on MCI to include language expressly including ISP-bound traffic. Interestingly, BellSouth is not using the Declaratory Ruling here the way it usually does, as an edict forbidding the payment of reciprocal compensation for ISP-bound traffic, but rather as an indication of the prevailing treatment of such traffic which then serves as the context of any contractual language regarding reciprocal compensation. Putting aside this potential inconsistency, and focusing on the question of what should or should not have been expressly stated at the time of the Brooks Fiber Agreement, it should be noted that BellSouth is overlooking the language contained in the MCImetro Agreement and BellSouth's General Subscriber Service Tariff which indicates an intent to include ISP-bound traffic in the reciprocal compensation obligations. The *Hyperion* and *MCImetro Orders* discussed this language extensively, and it provided part of the basis of those decisions. See *MCImetro Order*, pp. 22-27.

⁴⁰ See the discussion of the Order on Remand in the *MCImetro Order*, p. 30.

agreement entered into before the effective date of the Order on Remand requires the payment of reciprocal compensation for ISP-bound traffic.⁴¹

BellSouth cites the FCC's statement in the Order on Remand that the Order does not "preempt any state commission decisions regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here."⁴² BellSouth states:

The Authority has yet to issue a decision regarding compensation for ISP-bound traffic for the Second MCI/Brooks Fiber Agreement. Thus, the FCC determination that ISP-bound traffic is not subject to reciprocal compensation applies to the Authority's interpretation of that agreement.⁴³

BellSouth appears to be arguing that the TRA is without authority to rule on the Brooks Fiber Agreement because such a ruling would occur after the Order on Remand. This argument misinterprets the language BellSouth quotes from that Order. The quoted language is "decisions regarding compensation for ISP-bound traffic **for the period** prior to the effective date of the interim regime." (Emphasis provided). The FCC is clearly referring to traffic that was exchanged, not decisions that were issued, during the period before the Order on Remand.

BellSouth may also be arguing that the Order on Remand forms the legal background against which the Authority must interpret the Brooks Fiber Agreement. This argument is inconsistent with BellSouth's earlier argument regarding the time period for which the Authority must determine the intent of the parties. The Order on Remand obviously could not establish the law under which the Brooks Fiber Agreement was negotiated, since it was not issued until two years later. Further, the Order on Remand does not preclude a determination by the Authority that the Brooks Fiber Agreement requires reciprocal compensation for ISP-bound traffic. The

⁴¹ The Order on Remand does, however, reduce the amount that is to be paid under a pre-existing interconnection agreement by placing such payment under a diminishing cap. *See* Order on Remand, ¶¶ 7, 77.

⁴² Order on Remand, ¶ 82, quoted in Response, p. 13.

⁴³ Response, p. 13.

effect of the Order on Remand is to limit such payment in the period following the effective date of the interim regime.⁴⁴ In this case, as in *MCImetro*, BellSouth incorrectly cites the Declaratory Ruling as a simple ban on reciprocal compensation for ISP-bound traffic,⁴⁵ and BellSouth incorrectly cites the Order on Remand as a similar ban for the period prior to its effective date.

Summary judgment is appropriate in this case, under the standards set forth in Authority Rule 1220-1-2-.22, on the issue of whether the Brooks Fiber Agreement requires reciprocal compensation for ISP-bound traffic, and the Hearing Officer **grants** MCI's Motion on this issue. On the issue of the amount that is owed, however, the Hearing Officer believes that insufficient evidence has been presented. Indeed, MCI did not include a specific amount in its prayer for relief. MCI has stated what it claims to be the applicable rate,⁴⁶ but has not presented evidence as to the number of minutes or the period for which reciprocal compensation is owed. Such evidence is necessary to establish the extent of BellSouth's liability to MCI under the Brooks Fiber Agreement. Further, the Hearing Officer agrees with BellSouth that it is desirable to resolve billing issues along with liability issues and thus avoid reopening a proceeding at a later time for the sole purpose of resolving billing issues.

For these reasons, on the issue of amounts due, MCI's Motion is **denied**, and this proceeding will continue for the purpose of resolving the issue of amounts due. This action is taken in recognition of the fact that some issues related to the amounts due may be, as MCI argues, exclusively a matter of law. Nevertheless, since the issue of amounts due has not been

⁴⁴ See e.g. Order on Remand, ¶¶ 7, 77.

⁴⁵ See *MCImetro Order*, pp. 15-22.

⁴⁶ In its Petition, at p. 5, MCI states that the *MCImetro* Agreement provides that "the rate for terminating a local call is \$0.0050 per minute through a tandem or \$0.0040 per minute for interconnection directly to an end office." At the September 19, 2001 Pre-Hearing Conference, counsel for MCI stated that MCI would be willing to accept payment at the end-office rate. Notwithstanding this offer, it is necessary to establish the amount owed, and to do so it is necessary that evidence of the number of minutes and period for which reciprocal compensation is owed be submitted, in addition to evidence to establish the applicable rate.

specifically resolved in the Authority's prior cases involving ISP-bound traffic, and since the Petition does not specifically request an amount, all issues related to amounts due will be resolved at the same time.

Therefore, the Hearing Officer hereby establishes the following procedural schedule for the resolution of the issue of amounts due:

- | | |
|-------------------------|---|
| October 2, 2001 | Stipulations to facts and issues, and pre-filed direct testimony of both parties. |
| October 9, 2001 | Rebuttal to pre-filed direct testimony of both parties. |
| October 16, 2001 | Hearing on the merits. |

In deciding to keep this proceeding open for the resolution of payment issues, the Hearing Officer is mindful that the Authority's prior rulings on the issue of ISP-bound traffic have only decided the issue of whether reciprocal compensation is required and have not addressed the exact amounts to be paid.⁴⁷ Subsequent experience related to those proceedings has shown that this may not have been the ideal course. The Hearing Officer strongly recommends, therefore, that any future petition related to the issue of reciprocal compensation for ISP-bound traffic contain a specific prayer for relief stating amounts due, supported by documentation, and that the issue of amounts due should be incorporated into any future proceedings on the reciprocal compensation issue.

IT IS THEREFORE ORDERED THAT:

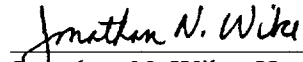
1. MCI's Motion for Summary Judgment is granted in part and denied in part as set forth in this Order.

⁴⁷ See the Authority's Orders in *Brooks Fiber*, Docket No. 98-00118, *Hyperion*, Docket No. 98-00530, and *MCImetro*, Docket No. 99-00662.

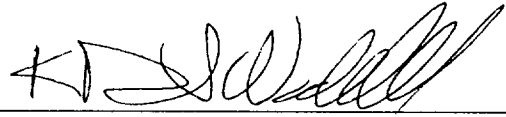
2. The Brooks Fiber Agreement requires the payment of reciprocal compensation for ISP-bound traffic.

3. BellSouth shall pay MCI any reciprocal compensation due for ISP-bound traffic, subject to the limitations imposed by the FCC's Order on Remand, the amount of which will be determined in subsequent proceedings in this docket.

4. Further proceedings in this matter shall follow the procedural schedule established in this Order.


Jonathan N. Wike, Hearing Officer

ATTEST:


K. David Waddell, Executive Secretary